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Part I—Rules Governing Appeals to Circuit Court (MCR Subchapter 7.100)

5.1 District Court

MCL 600.8342 Appeals from district court

MCR 7.101 General procedure for appeals to Circuit Court

MCR 7.102 Appeals from Municipal Courts

MCR 7.103 Application for leave to appeal to Circuit Court

A. Appeal of Right

Appeals from final judgments and orders are by right; all other appeals are by leave. MCL 600.8342(2). In criminal cases, all appeals from convictions based on guilty or nolo contendere pleas are by leave. MCL 600.8342(4) and MCL 770.3(1)(d).

MCR 7.101 sets forth the procedure for appeals to the circuit court. MCR 7.101(B)(1) states that unless

> "another time is prescribed by statute or court rule, an appeal of right must be taken within
>
> > (a) 21 days after the entry of the order or judgment appealed from; or
> >
> > (b) 21 days after the entry of an order denying a motion for new trial or judgment notwithstanding the verdict, a motion for rehearing or reconsideration, or a motion for other postjudgment relief, if the motion was filed within the original 21-day period.
>
> "A motion for rehearing or reconsideration of a motion mentioned in subrule (B)(1)(b) does not extend the time for filing a claim of appeal, unless the motion for rehearing or reconsideration was itself filed within the 21-day period."

MCR 7.101(B)(2) states that "[w]hen an appeal of right is not available, or the time for taking an appeal of right has passed, the time for filing an application for leave to appeal is governed by MCR 7.103."

B. Appeal By Leave

A Circuit Court may grant leave to appeal a final judgment or order if no appeal of right exists or the time for taking an appeal of right under MCR 7.101(B)(1) has expired. MCR 7.101(A)(1)–(2).

MCR 7.103 governs applications for leave to appeal to the circuit court. MCR 7.103(B) states:

> "(1) Except when another time is prescribed by statute, an application for leave to appeal must be filed within 21 days after the entry of the judgment or order appealed from.
>
> "(2) The application must state the grounds for the appeal and describe the proceedings in the trial court.
>
> "(3) A copy of the application must be filed with the trial court and served on the appellee. If service cannot reasonably be accomplished, the appellant may ask the circuit court to prescribe service under MCR 2.107(E).
>
> "(4) The application must be noticed for hearing in the circuit court at least 14 days after its filing. The circuit court may shorten the notice period on a showing of a need for immediate consideration.

> "(5) The circuit court shall consider the merit of the grounds for the appeal and enter an order granting or denying leave to appeal.
>
> "(6) An application under subrule (A)(2) or an application that is not timely under subrule (B)(1), must be accompanied by an affidavit explaining the delay. The circuit court may consider the length of and the reasons for the delay in deciding whether to grant the application. A delayed application may not be filed more than 6 months after entry of the order or judgment on the merits."

Nothing in MCR 7.103(B)(4) states that the Circuit Court must hold a hearing on an application for leave to appeal. In *People v Fosnaugh*, 248 Mich App 444, 449 (2001), the Court of Appeals held that the Circuit Court did not err in denying the prosecution oral argument. An application for leave to appeal is generally heard on the court's motion docket. *Michigan Court Rules Practice*, Rule 7.103, Authors' Comment, p 76.

C. Standard of Review

An appellate court reviews the findings of fact by a trial court sitting without a jury under the clearly erroneous standard. *Walters v Snyder,* 239 Mich App 453, 456 (2000). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Id.* A trial court's conclusions of law are reviewed de novo. *Omnicom v Giannetti Investment Co,* 221 Mich App 341, 348 (1997).

5.2 Administrative—Generally

Const 1963, art 6, § 28

MCL 600.631 Appeal from order, decision, or opinion of state board, commission, or agency

MCR 7.104 Appeals from administrative agencies

MCR 7.105 Appeals from administrative agencies in "contested cases"

A. Standard of Review

Const 1963, art 6, § 28 states in part:

> "All final decisions, findings, rulings, and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial

> and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings, and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record."

Becker-Witt v Bd of Examiners, 256 Mich App 359, 361-362 (2003), contains the following summary of administrative review:

> "Generally, an "'administrative agency decision is reviewed by the circuit court to determine whether the decision was authorized by law and supported by competent, material, and substantial evidence on the whole record.'" *Barak v Oakland Co Drain Comm'r,* 246 Mich App 591, 597; 633 N.W. 2d 489 (2001), quoting *Michigan Ed Ass'n Political Action Committee (MEAPAC) v Secretary of State,* 241 Mich App 432, 443-444; 616 N.W. 2d 234 (2000). 'Substantial evidence' is defined as "'any evidence that reasonable minds would accept as adequate to support the decision; it is more than a mere scintilla of evidence but may be less than a preponderance of the evidence.'" *Barak,* 246 Mich. App. at 597, quoting *MEAPAC,* 241 Mich. App. at 444.
>
> "We review a trial court's review of an agency decision to determine "'whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings.'" *Dignan v Mich Pub School Employees Ret Bd,* 253 Mich App 571; 659 N.W. 2d 629 (2002), quoting *Boyd v Civil Service Comm,* 220 Mich. App. 226, 234; 559 N.W. 2d 342 (1996). This is essentially a 'clearly erroneous' standard of review. *Dignan,* 253 Mich. App. at 575, citing *Boyd,* 220 Mich. App. at 234-235. (Footnote omitted.)

The court in *Brandon Sch Dist v Michigan Educ Special Servs Ass'n*, 191 Mich App 257, 263 (1991), found that if no hearing is required (i.e., it is not a "contested case"), it is improper for the Circuit Court or the Court of Appeals to review the evidentiary support for an administrative agency's determination. In such cases, "[j]udicial review is not de novo and is limited in scope to a determination whether the action of the agency was authorized by law." *Id.*

There is much confusion regarding the meaning of the constitutional standard of whether an agency's decision is authorized by law. *Nw'rn Nat'l Cas Co v Comm'r of Ins*, 231 Mich App 483, 488 (1998). It seems clear that an

agency's decision is not authorized by law if it "is in violation of statute [or constitution], in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious." *Brandon, supra*. This interpretation is almost identical to the standards set out in MCL 24.306(1) of the Administrative Procedures Act (APA). *Nw'rn Nat'l Cas Co, supra*. It "is also a reasonable articulation of the constitutional standard because it focuses on the agency's power and authority to act rather than on the objective correctness of its decision." *Id.* In *Nw'rn Nat'l Cas Co,* the Court adopted the *Brandon* Court's formulation of whether an agency's decision is authorized by law. *Id.*

Judicial review of a final decision or order in a "contested case" is governed by the Michigan Administrative Procedures Act, MCL 24.201 *et seq*. Specifically, MCL 24.306 provides:

> "(1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
>
> (a) In violation of the constitution or statute.
>
> (b) In excess of the statutory authority or jurisdiction of the agency.
>
> (c) Made upon unlawful procedure resulting in material prejudice to a party.
>
> (d) Not supported by competent, material and substantial evidence on the whole record.
>
> (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
>
> (f) Affected by other substantial and material error of law."

B. Application of MCR 7.104 and 7.105

MCL 600.631 provides:

> "An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. Such

> appeals shall be made in accordance with the rules of the supreme court."

The Michigan Court Rules provide two different rules for the appeal of agency decisions: MCR 7.104 and MCR 7.105. MCR 7.104 generally provides that "[a]n appeal in the circuit court under MCL 600.631 . . . is governed by MCR 7.101 and 7.103, except that the bond requirements do not apply." MCR 7.104(B)-(D) contain the rules for appeals pursuant to the Michigan Employment Security Act, from the Michigan Civil Service Commission, and from the Michigan Parole Board.

MCR 7.105 applies to appeals from administrative agencies in "contested cases." A "contested case" is

> ". . . a proceeding including but not limited to ratemaking, price fixing, and licensing, in which determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing. An appeal of one agency's decision to another agency is a continuous proceeding as though before a single agency." MCR 7.105(A)(2). See also MCL 24.203(3).

The operative words in this definition are "after an opportunity for an evidentiary hearing." MCR 7.105 does not apply to the appeal of an administrative decision unless the statute governing the agency provides for an evidentiary hearing at the administrative level.

Thus, for an administrative appeal that is not a "contested case," the appeal is governed by MCR 7.104. For "contested cases," the appeal is governed by MCR 7.105. MCR 7.105 does not apply to appeals from the Michigan Civil Service Commission or the Michigan Parole Board, or appeals under the Michigan Employment Security Act unless specifically provided under MCR 7.104 or materials referenced therein.

C. Appellate Standard of Review

The lower court's review of an agency action is reviewed to determine "whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Boyd v Civil Serv Comm'n,* 220 Mich App 226, 234 (1996).

5.3 Michigan Employment Security Commission

MCL 421.38 Review by Circuit Court

MCR 7.104(B) Appeals under the Michigan Employment Security Act

A. Scope of Judicial Review (Standard of Review)

When a statute authorizing an agency to act sets forth rules governing judicial review, those rules must be followed. MCL 421.38 sets forth the scope of judicial review. That statute provides in relevant part:

> "(1) The circuit court . . . may review questions of fact and law on the record made before the referee and the board of review involved in a final order or decision of the board, and may make further orders in respect to that order or decision as justice may require, but the court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record. . . ."

A party must file in the Circuit Court "a claim of appeal within 30 days after the mailing to the party of the board of review's decision . . . ." MCR 7.104(B)(1)(a).

A court's review of decisions by the Michigan Employment Security Commission Board of Review is limited. *Trumble's Rent-L-Center v MESC*, 197 Mich App 229, 233 (1992). A court may only reverse a decision by the Board of Review if the court determines that it is contrary to law or not supported by competent, material, and substantial evidence. *Vanderlaan v Tri-County Hosp*, 209 Mich App 328, 331 (1995), citing MCL 421.38(1). "Substantial evidence is that which a reasonable mind would accept as adequate to support a decision. . . . Substantial evidence is more than a mere scintilla but less than a preponderance of evidence." *Trumble's Rent-L-Center, supra* at 233 (citation omitted). See also *In re Payne*, 444 Mich 679, 692 (1994). Findings of an administrative tribunal will ordinarily be upheld, and it is not the court's function to pass on the credibility of the witnesses or resolve conflicts in the evidence. *Soto v Dir, Michigan Dep't of Soc Servs*, 73 Mich App 263, 272 (1977). The reviewing court should not substitute its opinion for that of the administrative agency if there is the requisite evidence to support the administrative decision, regardless of whether the court might have reached a different result had it been sitting as the agency. *Murphy v Oakland Co Dep't of Health*, 95 Mich App 337, 339-340 (1980).

B. Appellate Standard of Review

The lower court's review of an agency action is reviewed to determine "whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Boyd v Civil Serv Comm'n,* 220 Mich App 226, 234 (1996).

5.4 Parole Board

MCL 791.234(9) Appeal to circuit court from grant of parole

MCR 7.104(D) Appeals from Michigan Parole Board

Prior to 2000, there were two types of parole appeals for prisoners: an appeal from the revocation of parole (to which due process rights apply) and an appeal from the denial of parole.

As of March 10, 2000, prisoners cannot appeal a parole board decision to deny parole. The statutory right to appeal a grant of parole is available only to a prosecutor and the crime victim. MCL 791.234(9).

The amendments to MCL 791.234 and MCR 7.104(D) eliminated judicial appeals by a prisoner of a decision denying parole. In *Morales v Michigan Parole Bd,* 260 Mich App 29, 34–42 (2003), the Court held that appeals to the Circuit Court by prisoners from decisions denying parole are not available under the Michigan Court Rule, the Department of Corrections Act, the Administrative Procedures Act, or the Revised Judicature Act.

A. Procedure for Appeal

Venue is proper only in the Circuit Court of the sentencing county. MCL 791.234(9) and MCR 7.104(D)(1).

MCR 7.104(D) provides in relevant part:

*See Section 5.1(B), above.

> "(2) Procedure. Except as otherwise provided in this rule, applications for leave to appeal are governed by MCR 7.103(B).*
>
> > (a) An application for leave to appeal may be filed within 28 days after the parole board mails to the prosecutor and the victim . . . a notice of action granting parole and a copy of any written opinion . . . .
> >
> > (b) A delayed application for leave to appeal may be filed under MCR 7.103(B)(6)."

MCR 7.103(B)(6) provides:

> "An application under subrule (A)(2) or an application that is not timely under subrule (B)(1), must be accompanied by an affidavit explaining the delay. The circuit court may consider the length of and the reasons for the delay in deciding whether to grant the application. A delayed

> application may not be filed more than 6 months after entry of the order or judgment on the merits."

The Circuit Court must decide "promptly" whether to grant leave to appeal. MCR 7.104(D)(3)(a). MCR 7.104(D)(3)(b) specifies that

> "[t]he circuit court must make its determination within 28 days after the application for leave to appeal is filed. If the court does not make a determination within that time, the court shall enter an order to produce the prisoner before the court for a show cause hearing to determine whether the prisoner should be released on parole pending disposition of the appeal."

Pursuant to MCR 7.103(B)(5), the court shall consider the merits of appellant's appeal when granting or denying leave to appeal.

MCR 7.104(D)(5) states as follows:

> "(5) Burden of Proof. The burden shall be on the appellant to prove that the decision of the parole board was
>
> > (a) in violation of the Michigan Constitution, a statute, an administrative rule, or a written agency regulation that is exempted from promulgation pursuant to MCL 24.207, or
> >
> > (b) a clear abuse of discretion."

B. Grounds for Grant of Parole

The discretion of the parole board is limited by the record and statutory requirements. *In re Parole of Johnson*, 219 Mich App 595, 596–597 (1996). The board must have "reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to the public safety." MCL 791.233(1)(a). A parole board panel must consider Department of Corrections parole guidelines when deciding whether to grant or deny parole. MCL 791.233e(5). However, the parole board must provide, in writing, substantial and compelling reasons for departing from the parole guidelines to grant parole to a prisoner who has a low probability of parole, as determined under the parole guidelines. MCL 791.233e(6).

A three-member parole board panel, when deciding a prisoner's eligibility for parole, need not meet in collegial discussion before reaching a decision and can circulate a parole applicant's file from one member to another until a decision by at least a majority of the members is reached. *In re Parole of Franciosi*, 231 Mich App 607, 608 (1998).

In the event of an appeal, the court reviews the prisoner's central office file at the Department of Corrections, and any other documents considered by the parole board when making its decision. MCR 7.104(D)(4)(c); *Hopkins v Parole Bd,* 237 Mich App 629, 633-634 (1999).

C. Standard of Review for Grant of Parole

A grant of parole is reviewed under the abuse of discretion standard. *Wayne County Prosecutor v Parole Bd*, 210 Mich App 148, 153 (1995). "[The parole board's] discretion, however, is not unfettered but . . . is circumscribed by the many requirements of the [applicable statutes]." *Id.*

D. Appeal From Parole Revocation

Due process, at a minimum, requires the availability of judicial review of parole revocation proceedings, and the Administrative Procedures Act provides the proper framework for such review. *Penn v Dep't of Corr,* 100 Mich App 532, 540 (1980). Historically, a parole revocation hearing was considered a "contested case," *Id.*, and an appeal of a decision to revoke parole was governed by MCR 7.105. The appellant must comply with the Administrative Procedures Act, MCL 24.301 et seq. The appellant has 60 days to appeal. MCL 24.304. After 60 days have passed, the appellant may file an action for habeas corpus. MCR 3.303; *Triplett v Deputy Warden,* 142 Mich App 774, 779 (1985). However, the standard of review is even higher in a habeas corpus action. There is no right to counsel for an appeal from a parole revocation proceeding. The prisoner's remedy for failure to comply with the timelines for revocation proceedings is a writ of mandamus, not discharge from prison. *Jones v Dep't of Corr,* 468 Mich 646 (2003); *Callison v Dep't of Corr,* 56 Mich App 260, 264-265 (1974). However, mandamus will not lie for the purpose of reviewing, revising or controlling the exercise of discretion reposed in administrative bodies. *Teasel v Dep't of Mental Health,* 419 Mich 390, 410 (1984).

E. Appellate Standard of Review

The lower court's review of an agency action is reviewed to determine "whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Boyd v Civil Serv Comm'n,* 220 Mich App 226, 234 (1996).

5.5 Secretary of State

MCL 257.323 Review of Secretary of State determination

MCL 257.323a Ex-parte orders

MCL 257.323c Restricted license

A. Venue

Except for implied consent appeals, review of license denial, suspension, revocation, or restriction is before the Circuit Court in the person's county of residence. MCL 257.323(1). Implied consent appeals must be filed in the county where the arrest occurred. *Id*.

B. Hardship Review Hearing—MCL 257.323c

A court may order the Secretary of State to issue a restricted license to an individual. MCL 257.323c(1). Under MCL 257.323(3), a court may order the Secretary of State to issue a restricted license if a denial, suspension, or restriction (but not a revocation) resulted from:

- physical or mental disability, MCL 257.303(1)(d);
- unsafe driving, MCL 257.320;
- driving with a suspended license, MCL 257.904(10)–(11);
- driving in violation of a probationary condition, MCL 257.310d; and
- a first violation of MCL 257.625f (refusal to submit to a test under the implied consent statute).

A court may not issue a restricted license if the person's license has been suspended under MCL 257.625f within the immediately preceding seven years, or if the person has accumulated 24 points within the preceding two years. MCL 257.323c(2)–(3).

If the court is authorized to issue a restricted license, "[t]he court may take testimony and examine all the facts and circumstances relating to the denial, suspension, or restriction. . . ." MCL 257.323(3).

The court is not authorized to enter an ex-parte order staying a denial, suspension, or restriction on the basis of hardship. MCL 257.323a(2).

C. Review of Secretary of State's Determination—MCL 257.323

A person must file a petition for review within 63 days of a final determination by the Secretary of State. MCL 257.323(1). However, for good cause shown, the court may allow the person to file the petition within 182 days of the final determination. *Id.*

MCL 257.323(4) provides that the court shall set aside the secretary of state's determination only if the petitioner's substantial rights have been prejudiced because the determination is any of the following:

> "(a) In violation of the Constitution of the United States, the state constitution of 1963, or a statute.
>
> "(b) In excess of the secretary of state's statutory authority or jurisdiction.
>
> "(c) Made upon unlawful procedure resulting in material prejudice to the petitioner.
>
> "(d) Not supported by competent, material and substantial evidence on the whole record.
>
> "(e) Arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion.
>
> "(f) Affected by other substantial and material error of law."

Except for cases of "hardship review" under MCL 257.323c, the court must confine its consideration to a review of the record of the hearing before the administrative hearing officer and the driver's master driving record. MCL 257.323(4).

The authority of the circuit court is limited in two ways: first, it can set aside but not modify a hearing office decision; second, a hearing officer decision can only be set aside if one of the statutory criteria is satisfied. *Rodriguez v Sec'y of State*, 215 Mich App 481, 482-483 (1996).

A hearing officer's decision should be affirmed if it is supported by the requisite evidence, even if the reviewing court concludes that it would have reached a different decision. *Kester v Sec'y of State,* 152 Mich App 329, 335 (1986).

There is no specific court rule governing appeals to the Circuit Court from the DLAD. Such appeals, however, are taken as contested case proceedings under MCR 7.105. *Bunce v Sec'y of State*, 239 Mich App 204, 216 n 2 (1999).

"Judicial review of an administrative licensing sanction under [MCL 257.303] shall be governed by the law in effect at the time the offense was committed or attempted." MCL 257.303e(6).

MCL 257.323a(1) provides in relevant part:

> "[T]he court may enter an ex parte order staying the suspension or revocation subject to terms and conditions

> prescribed by the court until the determination of an appeal to the secretary of state or of an appeal or a review by the circuit court . . . ."

However, the court is not authorized to grant ex-parte relief on the basis of hardship. MCL 257.323a(2).

D. Appellate Standard of Review

This standard is the same as the clearly erroneous standard of review. A finding is clearly erroneous when, after a review of the whole record, the appellate court is left with the firm and definite conviction that a mistake was made. *Dignan v Michigan Public Schools Employees Retirement Bd,* 253 Mich App 571, 575-576 (2002).

Part II—Tools for Deciding Appeals to Circuit Court

5.6 Standard of Review

A. Generally

The standard of review reflects the level of deference an appellate court gives to a decision of the lower court.

The standard of review is typically established by statute, case law, or court rule. It is one of the initial concerns in deciding any appeal. See MCR 7.212(C)(7). Generally, the standard of review on appeal will be de novo for questions of law, clearly erroneous for determinations of fact, or abuse of discretion for application of the law to the facts.

B. De Novo

The appellate court applies the de novo standard when reviewing questions of law. See *Cardinal Mooney High Sch v Michigan High Sch Athletic Ass'n*, 437 Mich 75, 80 (1991) and *People v Connor*, 209 Mich App 419, 423 (1995). De novo means that the appellate court reviews the question of law anew, without giving deference to the lower court's ruling. Issues of constitutional law are reviewed de novo. *In re Carey,* 241 Mich App 222, 226 (2000).

C. Clearly Erroneous

The appellate court applies the clearly erroneous standard when reviewing a lower court's findings of fact. MCR 2.613(C). A finding is considered "clearly erroneous" if, despite the fact that there is evidence to support the finding, the appellate court, after reviewing all the evidence, has a "definite

and firm conviction that a mistake has been committed." *Tuttle v Dep't of State Hwys*, 397 Mich 44, 46 (1976).

Deference shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appear before it. MCR 2.613(C).

D. Abuse of Discretion

The appellate court applies the abuse of discretion standard to a lower court's discretionary decisions. To show an abuse of discretion in making such decisions, "the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias." *Spaulding v Spaulding*, 355 Mich 382, 384-385 (1959).

E. Preserving Error for Appeal

MRE 103(a)(1)–(2) and (d) state as follows:

> "(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> > (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
> >
> > (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
>
> "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
>
> * * *
>
> "(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."

F. Harmless Error

MCR 2.613(A) states as follows:

> "(A) Harmless Error. An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice."

Similarly, MCL 769.26, applicable to criminal cases, states:

> "No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."

Preserved Error. Under MCL 769.26, the defendant has the burden of proving that the admission of preserved nonconstitutional error constitutes a miscarriage of justice. "Therefore, the bottom line is that [MCL 769.26] presumes that a preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire case, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495–496 (1999), overruling *People v Gearns*, 457 Mich 170 (1998). For preserved constitutional error, the prosecuting attorney must prove, and the court must determine, beyond a reasonable doubt that there is no reasonable probability that the error contributed to the conviction. *People v Anderson (After Remand),* 446 Mich 392, 405–406 (1994).

Unpreserved Error. In *People v Grant*, 445 Mich 535, 552–554 (1994), the Court held that for unpreserved nonconstitutional error, a defendant must show that "plain" (clear or obvious) error affected his or her substantial rights (i.e., prejudice). A reviewing court should reverse only when the defendant claims actual innocence or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. The "plain error rule" of *Grant* has been extended to claims of unpreserved constitutional error, including claims of instructional error. Requiring a contemporaneous objection provides the trial court an opportunity to correct the error, which could thereby obviate the necessity of further legal proceedings and would be by far the best time to address a defendant's constitutional and nonconstitutional rights. *People v Carines*, 460 Mich 750, 761-764 (1999).

G. Structural Error

The United States Supreme Court has explained that most constitutional errors can be harmless. However, a limited class of constitutional errors are structural and subject to automatic reversal. *Neder v United States*, 527 US 1, 8 (1999). "Structural errors, as explained in *Neder,* are intrinsically harmful, without regard to their effect on the outcome, so as to require automatic reversal. Such an error necessarily renders unfair or unreliable the determining of guilt or innocence. As the United States Supreme Court said in [*Rose v Clark*, 478 US 570, 577-578 (1986)], structural errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *People v Duncan*, 462 Mich 47, 51–52 (2000).

It is a structural error requiring automatic reversal to allow a jury to deliberate a criminal charge if there is a complete failure to instruct the jury regarding any of the elements necessary to determine whether the prosecution has proven the charge beyond a reasonable doubt. *Id.* at 52–53.

H. Right Result—Wrong Reason

Where the trial judge reaches the right result in deciding a case, the Court of Appeals will not disturb the result attained even though a wrong reason was assigned. *Peninsular Constr Co v Murray*, 365 Mich 694, 699 (1962), citing *McNair v State Highway Dep't*, 305 Mich 181 (1943).

5.7 Basis for Parties' Positions

A. Party Must State Basis for Claim

"A party may not merely announce his position and leave it to us to discover and rationalize the basis for his claim." *In re Toler*, 193 Mich App 474, 477 (1992). Accord *Mitcham v Detroit*, 355 Mich 182, 203 (1959), *Wilson v Taylor*, 457 Mich 232, 243 (1998), and *Silver Creek Twp v Corso*, 246 Mich App 94, 99 (2001).

As stated in *Mitcham, supra*:

> "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow."

If a party fails to cite any authority for its position, the issue is deemed abandoned. *People v Piotrowski,* 211 Mich App 527, 530 (1995); *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 116 (1999); *Prince v MacDonald*, 237 Mich App 186, 197 (1999).

On the other hand, a court has the discretion to address "a controlling legal issue despite the failure of the parties to properly frame the issue . . . ." *Mack v City of Detroit,* 467 Mich 186, 207 (2002).

B. Party Must Provide Record Supporting Claim

"It is the appellant's obligation to secure the complete transcript of all proceedings in the lower court unless production of the full transcript is excused by order of the trial court or by stipulation of the parties. This Court limits its review to the record provided on appeal and will not consider any alleged evidence or testimony that is not supported by the record presented to the Court for review." *Admiral Ins v Columbia Cas Ins*, 194 Mich App 300, 305 (1992).

5.8 Precedent

MCR 7.215(C) Precedent of Court of Appeals opinions

A. Michigan Supreme Court

A Supreme Court decision is controlling if it is the decision of a majority of the judges who were sitting on the case. *Negri v Slotkin*, 397 Mich 105, 110 (1976).

A decision of the Michigan Supreme Court has precedential effect under the rule of stare decisis. *Riley v Northland Geriatric Ctr*, 425 Mich 668, 678 (1986).

A case is stare decisis on a particular point of law if the issue is raised in the action decided by the court and its decision made part of the opinion of the case. *Terra Energy, Ltd v Michigan,* 241 Mich App 393, 399 (2000).

B. Michigan Court of Appeals

The decision of at least two of the three judges is controlling. *People v Bender*, 208 Mich App 221, 228-229 (1994).

A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis, but an unpublished opinion does not. MCR 7.215(C); *People v Kroll*, 179 Mich App 423, 426 (1989). Filing an application for leave to appeal or the granting of leave does not diminish the precedential effect of a published decision. MCR 7.215(C)(2). The first decision of the Court of

Appeals on an issue is the controlling authority unless reversed or modified by the Supreme Court or a special panel of the Court of Appeals. Michigan Supreme Court Administrative Order 1994-4.

The Supreme Court can "depublish" an opinion of the Court of Appeals so it has no precedential force or effect. See *People v Ullah*, 216 Mich App 669, 680 n 3 (1996).

C. Circuit Court

A decision of a circuit court does not have precedential value for another Circuit Court. *People v Nuss*, 405 Mich 437, 450 (1979), and *People v Hunt,* 171 Mich App 174, 180 (1988).

Arguably, *City of Detroit v Qualls*, 434 Mich 340 (1990), stands for the proposition that a circuit court opinion is not binding on a local district court.

D. U.S. Supreme Court

"[S]tate courts are bound by the decisions of the United States Supreme Court construing federal law. . . ." *Abela v General Motors Corp,* 469 Mich 603, 606 (2004).

E. Sixth Circuit Court of Appeals

A decision of the Sixth Circuit of the United States Court of Appeals is precedent on an issue of federal law. *Ogletree v Local 79 AFL-CIO*, 141 Mich App 738 (1985). But see *Schueler v Weintrob*, 360 Mich 621, 633-634 (1960), which suggests the Michigan courts are not bound by a Sixth Circuit holding if the Federal Circuit Courts of Appeals are in disagreement. State courts are not bound by the decisions of lower federal courts on issues of federal law. *Abela v General Motors Corp,* 469 Mich 603, 606 (2004).

F. Attorney General's Opinion

An attorney general's opinion is not binding on the Court of Appeals (and presumably not precedent for any court). *People v Kildow*, 99 Mich App 446, 449 (1980); *Garcia v Warren Civ Serv*, 78 Mich App 603, 608 (1977). The opinion can be persuasive authority. *Indenbaum v Michigan Bd of Med*, 213 Mich App 263, 274 (1995). The opinion of the attorney general "does not have the force of law." *East Grand Rapids Sch Dist v Kent County Tax Allocation Bd*, 415 Mich 381, 394 (1982).

G. Dicta

Disputed issues should be resolved in accordance with the dicta from a higher court, where applicable. Simply because language in an opinion is

unnecessary to the ultimate resolution of that case is no reason not to give it effect. The dicta still express the views of the higher court. *Fox v Detroit Plastic Molding*, 106 Mich App 749, 755 (1981).

H. Retroactivity of Judicial Decisions

The general rule is that judicial decisions are to be given complete retroactive effect. *Hyde v Univ of Michigan Regents*, 426 Mich 223, 240 (1986). Complete prospective application has generally been limited to decisions that overrule clear and uncontradicted case law. *Tebo v Havlik*, 418 Mich 350, 360-361 (1984).

Limited retroactivity is the favored approach when overruling prior law. *Tebo, supra*. Prospective application is warranted when overruling settled precedent or deciding cases of first impression whose result was not clearly foreshadowed. *Jahner v Dep't of Corr*, 197 Mich App 111, 114 (1992); *People v Phillips*, 416 Mich 63, 68 (1982).

If the issue of retroactivity arises, the three key factors are (1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect of retroactive application of the new rule on the administration of justice. *Linkletter v Walker*, 381 US 618 (1965); *People v Young*, 410 Mich 363, 366 (1981).

If a decision involves a rule which concerns the ascertainment of guilt or innocence, retroactive application may be appropriate. *Young*, *supra* at 367. Conversely, a new rule of procedure adopted by the Court that does not affect the integrity of the fact-finding process should be given prospective effect. *Id.*

5.9 Law of the Case

A. In General

The terms res judicata, collateral estoppel, and law of the case* are often used without distinction. *Topps-Toeller, Inc v City of Lansing*, 47 Mich App 720, 726 (1973). Those theories and their definitions are:

*See Section 3.5 for discussion of res judicata and collateral estoppel.

- Res judicata "bars the reinstitution of the same cause of action by the same parties in a subsequent suit." *Id.* at 727.
- Collateral estoppel "bars the relitigation of issues previously decided when such issues are raised in a subsequent suit by the same parties based upon a different cause of action." *Id.*
    - The above "two principles fulfill the judicial policy of providing the parties with a final decision upon litigated questions." *Id.*

- Law of the case accords "finality to litigated issues until the cause of action is fully litigated, including retrials or appeals, and the superseding doctrines of res judicata and collateral estoppel become effective." *Id.* at 729.

B. Law of the Case

Under the law of the case doctrine, an appellate court ruling on a legal question binds it and the lower tribunals in subsequent proceedings. *Int'l Union, United Auto, Aerospace and Agric Workers, UAW, Local 6000 v Michigan*, 211 Mich App 20, 24-25 (1995); *CAF Investment v Saginaw Twp*, 410 Mich 428 (1981); *People v Prophet*, 101 Mich App 618, 625 (1980); and *Poirier v Grand Blanc Twp (After Remand)*, 192 Mich App 539 (1992).

The law of the case doctrine dictates that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. *Drive v Hanley (After Remand)*, 226 Mich App 558, 565 (1997). Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case. *Id.* However, the doctrine does not preclude reconsideration of a question if there has been an intervening change of law or material change of fact. *Freeman v DEC Int'l, Inc*, 212 Mich App 34, 38 (1995). For this exception to apply, the change of law must occur after the initial decision of the appellate court. *Id.*

Whether law of the case applies is a question of law subject to review de novo. *Kalamazoo v Dep't of Corr (After Remand)*, 229 Mich App 132, 135 (1998); *Ashker v Ford Motor Co*, 245 Mich App 9, 13 (2001).

5.10 Statutory Construction and Interpretation

MCL 8.3 General rules of construction

A. Generally

General rules of statutory construction are contained within the Michigan Compiled Laws. MCL 8.3 provides that in the construction of the statutes of this state, the rules stated in sections 3a to 3w shall be observed, unless such construction would be inconsistent with the manifest intent of the Legislature. MCL 8.3a -8.3w contain specific definitions for commonly used terms. MCL 8.5 provides for severability of a portion of an act found to be invalid by a court.

The Michigan Penal Code contains its own rule of construction. MCL 750.2 provides "[t]he rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote

justice and to affect the objects of the law." *People v Brown,* 249 Mich App 382, 385 (2002).

The construction of statutes is a judicial function. *Webster v Rotary Elec Steel Co*, 321 Mich 526, 531 (1948).

Statutory interpretation is a question of law. *Smeets v Genesee County Clerk,* 193 Mich App 628, 633 (1992).

Legislation that is challenged on constitutional grounds is clothed in a presumption of constitutionality and is presumed constitutional absent a clear showing to the contrary. *Caterpillar v Dep't of Treasury*, 440 Mich 400, 413 (1992).

The court should sustain legislative enactments as they are written if they are not violative of the state or federal constitutions. *Howard Pore, Inc v State Comm'r of Revenue*, 322 Mich 49, 58 (1948).

If the statute is clear and unambiguous, construction or interpretation by the courts is unnecessary and impermissible. *Pioneer State Mut Ins Co v Allstate Ins Co*, 417 Mich 590, 595 (1983).

If the language of the statute is of doubtful and obscure meaning, it is the court's duty to give it a reasonable and sensible interpretation, looking to the purpose to be served by it. *People v McFarlin*, 389 Mich 557, 563 (1973).

A court must give effect to the obvious purpose of the statute. *Fulton v Citizens Mut Ins Co*, 62 Mich App 600, 603 (1975).

A fundamental rule of statutory construction is to carry out the purpose and intent of the Legislature in enacting a provision. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 212 (1993). Legislative history can be an important tool for determining legislative intent. See *Kizer v Livingston County Bd of Comm'rs*, 38 Mich App 239 (1972).

The rule of lenity directs that if the Legislature leaves to the judiciary the task of imputing an undeclared will, the ambiguity should be resolved in favor of lenity. *People v Bergevin*, 406 Mich 307, 311-312 (1979).

The court should construe a statute so as to make it internally consistent. *Hunt v City of Ann Arbor*, 77 Mich App 304, 308 (1977).

In construing a statute, the court should presume that every word has meaning and avoid a construction that would render a statute, or any part of it, surplusage or nugatory. *Altman v Meridian Twp*, 439 Mich 623, 635 (1992).

If, over a period of years, the Legislature has acquiesced in the Supreme Court's construction of a statute, the judicial power to change that

interpretation ought to be exercised with great restraint. *Dean v Chrysler Corp*, 434 Mich 655, 664 (1990).

> "Briefly stated the rules are: (1) when a statute is unambiguous, further construction is to be avoided; (2) if an ambiguity exists, the intent of the Legislature must be given effect; (3) a construction which best accomplishes the statute's purpose is favored; (4) statutes are to be interpreted as a whole and construed so as to give effect to each provision; (5) specific words in a statute are given their ordinary meaning unless a different interpretation is indicated; and (6) respectful consideration is to be given to the construction of a statute used by those charged with its application." *Nicholas v Retirement Bd*, 144 Mich App 70, 74 (1985).

If two statutes address the same subject, courts must endeavor to read them harmoniously and to give both statutes a reasonable effect. *House Speaker v State Admin Bd*, 441 Mich 547, 568 (1993).

If two statutes or provisions conflict, and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails. *Gebhardt v O'Rourke*, 444 Mich 535, 542-543 (1994).

If a statute and court rule conflict, the statute controls issues of substantive law while the court rule controls issues of procedure. See *Clemons v City of Detroit*, 120 Mich App 363, 370-373 (1982). See also *McAuley v Gen Motors Corp*, 457 Mich 513, 518 (1998) (regarding construction of a statute and court rule that relate to the same issue).

Principles of statutory construction apply to determine the Supreme Court's intent in promulgating rules of practice and procedure. *Issa v Garlinghouse*, 133 Mich App 579, 581 (1984). See also *MBPIA v Hackert Furniture*, 194 Mich App 230, 234 (1992).

The goal of statutory construction is to give effect to the intent of the Legislature. The language of the statute is the best source for ascertaining the Legislature's intent. Thus, if the statute is unambiguous on its face, courts will avoid further interpretation or construction of its terms. If the operative statutory language appears ambiguous, a court must look to the object of the statute, the evil or mischief which it is designed to remedy, and will apply a reasonable construction that best accomplishes the purpose of the statute. *Espinoza v Bowerman-Halifaz*, 121 Mich App 432, 436 (1982).

In construing the language of a statute, the court's responsibility is to ascertain and give effect to the legislative intent. The court must construe statutory language "according to the common and approved usage of the language." MCL 8.3(a). A resort to dictionary definitions is appropriate to achieve this result. *Murco Inc v Dep't of Treasury*, 144 Mich App 777, 782 (1985). A

court may depart from a literal reading of a statute if this will avoid a result patently inconsistent with the policies to be effected by the statute. *Musk Trades v Muskegon Schools*, 130 Mich App 420, 432 (1983). Further, statutes are to be construed so as to avoid absurd results. *Carroll v Calhoun County Econ Dev Corp*, 133 Mich App 238, 240 (1982).

Reference to a dictionary is appropriate to ascertain the ordinary meaning of a word. *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 470 (1994).

The construction of a statute by the agency authorized to administer the statute is not to be discarded unless the agency's interpretation is clearly wrong or a different interpretation is plainly required. *State v City of Detroit*, 130 Mich App 503, 508-509 (1983).

B. Retroactivity of Statutes

As a matter of statutory construction, statutes are presumed to operate prospectively unless the contrary intent is clearly manifested. *In re Davis Estate*, 330 Mich 647, 651-653 (1951). Moreover, the fact that the statute relates to antecedent events does not, in itself, require a finding that the statute operates retrospectively. *Hughes v Judges' Ret Bd,* 407 Mich 75, 85 (1979).

A court must consider four rules to determine whether a new act applies to a pre-enactment cause of action. First, is there specific language in the new act that states that it should be given retroactive application? Second, a statute is not regarded as operating retroactively solely because it relates to an antecedent event. Third, a retroactive law is one that takes away or impairs vested rights acquired under existing law, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. Fourth, a remedial or procedural act that does not destroy a vested right will be given effect where the injury or claim is antecedent to the enactment of the statute. *Karl v Bryant Air Conditioning*, 416 Mich 558, 571 (1982).

An exception to the general rule is recognized if a statute is remedial or procedural in nature. *Hansen-Snyder Co v Gen Motors Corp,* 371 Mich 480 (1963). Statutes that operate in furtherance of a remedy already existing and that neither create new rights nor destroy existing rights are held to operate retroactively, unless a contrary legislative intention is manifested. *Selk v Detroit Plastic Prods*, 419 Mich 1, 10 (1984).

5.11 Remand

MCR 7.211(C)(1) Motion to remand

A. Authority to Remand

MCR 7.211(C)(1) sets forth the requirements for a motion to remand. The Court of Appeals is not compelled to grant every motion to remand that is filed by appellants pursuant to MCR 7.211(C)(1)(a). Remand procedure is available only where the issue meets the requirements set forth in MCR 7.211(C). *People v Hernandez*, 443 Mich 1, 3 (1993).

B. Process Upon Remand

There is little case law in Michigan regarding the scope of a trial court's authority after a remand.

The lower court or tribunal reacquires jurisdiction over a case when the clerk returns the record to it. *Dep't of Conservation v Connor*, 321 Mich 648, 654 (1948).

The only rule that applies to trial court conduct after a remand is that the conduct must be consistent with the appellate mandate. *People v Kennedy*, 384 Mich 339, 343 (1979).*

*The law of the case doctrine requires the lower court to follow a decision of the appellate court in the same case. See Section 5.9.

5.12 Writing Opinions

MCR 2.517 Findings by court

A. Generally

The best opinion is clear, concise, and written in the active voice.* This style has been termed the "agent/action" style. This writing style adopts the mandates of the plain language movement. Each sentence assigns responsibility, defines action, and states its consequences. In the following example, the second sentence illustrates the characteristics of the agent/action style.

*This section contains the author's suggestions for preparing a written opinion.

1. There was aggression in appellant Jones' pursuit of appellee.

2. Appellant Jones pursued Smith aggressively.

Avoid footnotes, personalizing the argument, and the passive voice. Write to the inevitable conclusion.

B. Specifically

Opinion writing involves four basic steps: research, oral arguments, plan of attack, and the actual writing.

1. Research

Become familiar with the case by reading the briefs and the case file. Determine whether the briefs appear to accurately state the applicable law. Do any additional research necessary after reading the briefs. Then the judge and the law clerk should discuss the proposed opinion, examining the structure, rationale, and the result.

2. Oral Arguments

Occasionally the attorneys bring up new issues or information that affects the course of the opinion. This is rare. Usually the opinion can be drafted before oral arguments.

3. Planning the Opinion

Each type of opinion follows a different format. Develop an outline for the opinion being drafted and have a clear idea of where information will fit into the outline. Determine what issues will be decided. If the case turns on a procedural issue, do not plan an opinion addressing gratuitous substantive issues. However, if the result would be the same, stating so makes the opinion even stronger.

Also, consider your audience and the aim of the opinion. Is the decision primarily for the attorneys, or will another court or administrative agency be looking to the opinion for guidance?

4. Writing the Opinion

An opinion consists of roughly seven parts, which may or may not be labeled.

Introduction: An opening paragraph used to establish who the parties are and what actions lead up to the decision at hand.

Statement of Facts: The statement should identify the who, what, where, why, and how of the case in chronological order. It should include all facts relevant to the outcome of the decision at hand in clear, concise language. Avoid quotations, excerpts from pleadings, and citations. The statement of facts constitutes the facts as found by the court.

Issues: Sometimes it will be helpful to include a separate section that states the issue(s) being addressed by the court. If used, the statement of the issue(s) should be clear and concise.

Standard of Review: This section should clearly state the standard the court is using to weigh the facts in the decision at hand. Citations are a vital part of this section of the opinion.

Discussion (Analysis or Conclusions of Law): This section should start with a concise statement or paragraph setting forth the law applicable to the issue at hand. If there is more than one issue, a statement of the applicable law should immediately precede the discussion. Use citations, but avoid string citations and lengthy quotations. After stating the applicable law, apply the law to the facts as stated in the statement of facts, ending with your conclusion.

Conclusion: Succinctly restate the conclusion(s) in one sentence. This statement should include the reasons for the decision. The restatement is particularly important if multiple issues were addressed in the opinion.

Order: A phrase ordering the decision is a necessary end to the opinion. A typical example is: "It is so Ordered."

Final Thoughts: Good briefing tends to lead to good opinions. Bad briefing makes drafting an opinion more difficult. As a result, bad briefing tends to lead to a poorly written decision through no fault of the drafter. This is because the drafter is reading and revising language initially crafted by others, rather than researching a topic and writing from scratch. It may be best to write "from scratch" rather than working from poorly researched, thought out, or written briefs.